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April 23, 2020

***Via Federal Express and Email***

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**CONFIDENTIAL SETTLEMENT COMMUNICATION  
FEDERAL RULES OF EVIDENCE § 408**

Re: **Haystack Mines Site, McKinley County, New Mexico  
Demand Letter**

Dear Ms. Chen and Ms. Gallo:

We represent BNSF Railway Company ("BNSF") in this matter. Pursuant to the terms of the Administrative Settlement Agreement and Order on Consent for Removal Action, CERCLA Docket Nos. 09-2017-02 and 06-02-17, entered by the U.S. Environmental Protection Agency ("EPA") and BNSF (the "AOC"), BNSF is carrying out a time-critical removal action ("TCRA") at the Haystack Mines Site in McKinley County, New Mexico (the "Site"). EPA has also advised BNSF that it intends to ask BNSF to carry out additional removal or remedial actions at the Site. The AOC has an effective date of May 15, 2017. BNSF intends to file suit against the United States on or before May 15, 2020 to seek contribution and cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and federal law for past costs incurred and a declaration regarding liability for future costs.

BNSF will allege that two principal executive departments, the Department of Energy ("DOE") and the Department of the Interior ("DOI"), along with various sub-department-level agencies, are liable to BNSF under CERCLA and federal law. The liability of the United States related to this Site is straightforward and well-established by case law.

Among other bases of liability, DOE is liable under CERCLA as an owner of land at the Site during a period of disposal of hazardous substances, an operator for its creation and total control over the domestic uranium procurement program, its leasing of its own land for uranium

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mining, for instructing uranium miners on waste disposal practices, and as an arranger for its ownership and possession of the hazardous substances disposed at the site.

Among other bases of liability, DOI is liable under CERCLA as a current owner of land at the Site, as an owner of land at the Site during a period of disposal of hazardous substances, as an operator for its control and authorization of mining and associated waste disposal and reclamation, for directing waste disposal actions by uranium miners at the Site, for carrying out the reclamation at the Site, and as an arranger for its ownership and possession of the hazardous substances disposed at the site.

Recent cases have confirmed the liability of the United States in analogous circumstances, including *El Paso Natural Gas Co. v. United States*, 390 F. Supp. 3d 1025 (D.Ariz. 2019), *Chevron Mining, Inc. v. United States*, 863 F.3d 1261 (10th Cir. 2017), and *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050 (E.D. Wash. 2007).

Those cases, particularly *El Paso Natural Gas* and *Newmont USA*, confirmed the CERCLA liability of the United States arising from abandoned uranium mines, including mines located on federal lands and Indian allotment lands, like the Haystack Mines Site. In those cases, the United States was allocated a 35% share (*El Paso Natural Gas*) and a 33% share (*Newmont USA*) of the overall liability for past and future costs. Notably, those cases all addressed the allocation of liability, broadly speaking, between the owner of the land (the United States) and the private-party operators of the mine sites.

Unlike those cases, BNSF predecessors operated on only one of the four parcels comprising the Haystack Mines Site, and had no connection whatsoever to the mining on the other three parcels within the Site – all of which were owned by the United States. Additionally, BNSF predecessors mined only approximately 30% of the total uranium ore produced at the Site. Further, unlike *El Paso Natural Gas*, BNSF predecessors did not conduct any milling of uranium ore.

At Haystack, the United States specifically reserved its land for uranium mining, issued leases for uranium mining by DOE and by DOI, oversaw all mining activities from reconnaissance to milling, and specifically directed certain waste disposal actions for uranium mining waste at the Site. More than 55% of the total uranium ore produced at the Haystack Mines Site came from United States-owned property and lessees. When EPA sought reclamation at the four parcels in 1991, EPA asked DOE to carry out the reclamation at Section 13. DOE declined. Ultimately, EPA carried out the reclamations on the three federally-owned parcels, including Section 13. For the privately-owned parcel, EPA asked private entities including BNSF predecessors to carry out the reclamation, which they promptly concluded to EPA's satisfaction.

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These factors confirm that an equitable apportionment of liability at the Haystack Mines Site will result in a much higher allocation being assigned to the United States than in the *El Paso Natural Gas* and *Newmont USA* cases addressed above. On these facts, in our judgment, the United States's fair share of the overall liability arising from the Haystack Mines Site, for both past costs incurred by BNSF and for any future costs, exceeds 70% of the total Site liability.

Although it is prepared to file its cost recovery and contribution complaint, and litigate the action to conclusion, BNSF is interested in resolving this matter without litigation if a reasonable resolution can be achieved. BNSF is prepared to accept its fair share of responsibility for response costs, and expects the United States to accept its fair share as well. BNSF requests your agreement to the above allocation or to enter into the attached tolling agreement by **May 1, 2020**, so that the parties may evaluate settlement before BNSF files its complaint. BNSF plans to file its complaint on or before May 15, 2020. In the meantime, please let us know if you have questions or need further information.

Very truly yours,

A handwritten signature in black ink, appearing to read "John F. Barg". The signature is fluid and cursive, with a long, sweeping underline.

John. F. Barg

DMM/dmm

Enclosure

**TOLLING AGREEMENT**  
**BETWEEN BNSF RAILWAY COMPANY AND THE UNITED STATES, ON BEHALF**  
**OF THE DEPARTMENT OF ENERGY AND DEPARTMENT OF THE INTERIOR**

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**RECITALS**

**WHEREAS**, this Agreement is entered between BNSF Railway Company (“BNSF”) and the United States, on its own behalf and on behalf of its agencies the United States Department of Energy (“DOE”) and the United States Department of the Interior (“DOI”) (collectively, the “United States”). BNSF and the United States are sometimes referred to as a “Party” or the “Parties” to this Agreement; and

**WHEREAS**, BNSF contends that it has causes of action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, (“CERCLA”) and federal common law against the United States, specifically against DOE and DOI, for contribution and recovery of response costs incurred, or that may be incurred, by BNSF in connection with releases or threatened releases of hazardous substances at or from a facility located at the Haystack Mines Site in McKinley County, New Mexico (the “Site”); and

**WHEREAS**, BNSF entered into an Administrative Settlement Agreement and Order on Consent (“AOC”) on May 15, 2017, pursuant to which BNSF agreed to undertake a time-critical removal action (“TCRA”) at the Site; and

**WHEREAS**, BNSF is engaged in completing the TCRA currently, and EPA has advised BNSF that it will ask BNSF to conduct additional response actions at the Site; and

**WHEREAS**, BNSF has presented a demand letter to the DOE and DOI, alleging that the

United States is liable under CERCLA for contribution and cost recovery to BNSF, and that BNSF is prepared to file a complaint in federal District Court to establish that liability in a court of law; and

**WHEREAS**, The Parties wish to enter into this Agreement to facilitate pre-litigation settlement negotiations between the Parties within the time period provided by this Agreement, without thereby altering the claims or defenses available to any Party hereto, except as specifically provided herein; and

**WHEREAS**, in this Agreement, BNSF's claims against the United States regarding the Site are referred to as the "Tolled Claims."

### **AGREEMENT**

The Parties, in reliance upon the above Recitals and in consideration of the covenants set out herein, agree as follows:

1. The time period commencing on May 1, 2020 and ending on the "Termination Date" defined below in paragraph 7, (the "Tolling Period"), shall not be included in computing the running of any statute of limitations potentially applicable to any action or claim brought by BNSF against the United States on the Tolled Claims, including any action or claim brought by BNSF under CERCLA.

2. Neither BNSF nor the United States shall assert, plead, or raise against the other in any fashion, whether by answer, motion or otherwise, any defense of laches, estoppel, or waiver, or other similar equitable defense based on the running of any statute of limitations or the passage of time during the Tolling Period, in any action brought on the Tolled Claims.

3. This Agreement does not constitute an admission or acknowledgment of any fact, conclusion of law, or liability by the Parties. Nor does this Tolling Agreement constitute any admission or acknowledgement on the part of BNSF that any statute of limitations, or similar defense concerning the timeliness of commencing a civil action, is applicable to the Tolloed Claims. BNSF reserves the right to assert that no statute of limitations applies to any of the Tolloed Claims and that no other defense based upon the timeliness of commencing a civil action is applicable.

4. This Agreement does not limit in any way the nature or scope of any Tolloed Claims that could be brought by the Parties against one another in a complaint or counter-claim, nor the defenses that may be asserted by the Parties in response to Tolloed Claims should they be filed, except as stated in paragraphs 1 and 2 above.

5. This Agreement is not intended to affect any claims by or against entities who are not Parties.

6. This Agreement is not intended to be applicable to any claims between the Parties other than the Tolloed Claims.

7. The "Termination Date" of this Agreement is October 28, 2020, unless the Parties agree to extend the Agreement in a writing signed by both Parties.

8. Any written notice required by this Agreement shall be effective on the date it is transmitted by overnight delivery or electronic mail to:

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FOR UNITED STATES:

Name  
Address  
Tel:  
Email:

FOR BNSF RAILWAY COMPANY:

John F. Barg, Esq.  
David M. Metres, Esq.  
Barg Coffin Lewis & Trapp, LLP  
600 Montgomery Street, Suite 525  
San Francisco, CA 94111  
Tel: (415) 228-5400  
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Email: [dmetres@bargcoffin.com](mailto:dmetres@bargcoffin.com)

9. This Agreement is effective upon execution by the Parties, and without the requirement of filing with the Court, and may be signed in counterparts.

10. This Agreement contains the entire agreement between the Parties, and no statement, promise, or inducement made by any Party to this Agreement that is not set forth in this Agreement shall be valid or binding, nor shall it be used in construing the terms of this Agreement as set forth herein.

11. This Agreement may not be modified except in a writing signed by both Parties. The Parties acknowledge that this Tolling Agreement may be extended for such period of time as the Parties agree to in writing.

12. It is understood that BNSF may terminate settlement negotiations and commence suit at any time, upon provision of written notice to the United States. Where BNSF elects to

terminate negotiation under this paragraph, the Tolling Period shall continue for the duration set forth in paragraph 1.

13. This Agreement may be executed in duplicate originals. An electronic signature shall have the same force and effect as an original signature.

14. The undersigned representative of each of the Parties certifies that they are fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party to all terms and conditions of this document.

The United States consents to the terms and conditions of this Tolling Agreement by its duly authorized representative on this \_\_\_\_ day of April, 2020.

By: \_\_\_\_\_  
[NAME]  
UNITED STATES OF AMERICA

BNSF consents to the terms and conditions of this Tolling Agreement by its duly authorized representative on this \_\_\_\_ day of April, 2020.

By: \_\_\_\_\_  
JOHN F. BARG  
BARG COFFIN LEWIS & TRAPP, LLP